

NO. 78888-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL FOXHOVEN and ANTHONY SANDERSON,

Petitioners.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Michael Moynihan, Judge

SUPPLEMENTAL BRIEF OF PETITIONER MICHAEL FOXHOVEN

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A. ISSUE PRESENTED

In a prosecution for malicious mischief based on graffiti vandalism, was it error to admit evidence of prior acts of graffiti by the defendant to establish identity when, except for the sequence of letters used, the temporal and geographic proximity, medium, font, style and method of application were all significantly different between the prior and charged acts?

B. STATEMENT OF THE CASE

On October 26, 2001, several business owner in downtown Bellingham discovered their shop windows had been vandalized with graffiti. 5RP¹ 318, 320-21, 357, 360, 363, 366, 370, 373, 376-77, 380-81, 383; 6RP 387, 390. In investigating vandalism, police learned the graffiti had been applied using an acid etching compound. 6RP 432. The graffiti consisted of the words "GRAVE," "HYMN," and "SERIES." 6RP 433.

In attempting to identify who was responsible for the graffiti, Officer Don Almer contacted graffiti investigators at other local law enforcement agencies. 6RP 396, 431, 434. He received information that led him to suspect Desmond Hansen was associated with the graffiti tag² "GRAVE."

¹ The Verbatim Report of Proceedings is contained in nine volumes, designated as follows: 1RP-7/28/03; 2RP-9/2/03 and 9/29/03; 3RP-3/18/04; 4RP-6/14/04 and 6/15/04; 5RP-6/16/04 and 6/17/04; 6RP-6/21/04; 7RP-6/22/04; 8RP-6/23/04; 9RP-6/24/04, 6/25/05, and 8/19/04.

² A "tag" is a moniker used by someone who does graffiti. 6RP 409.

6RP 435. Almer obtained a search warrant for Hansen's residence. During the search, he found a number of graffiti-related items, including acid etching materials and other evidence. 6RP 443; 8RP 763.

Almer next searched the home of Ben Amador, a Seattle high school student associated with the HYMN tag. 6RP 476. Among the graffiti-related materials located at Amador's residence, Almer found acid etching applicators. 6RP 485. Following the search, however, Amador was eliminated as a suspect. 6RP 486.

Almer next obtained a warrant to search the residence of Luke Meighan and Reid Morris, two known Bellingham taggers, following up on a possible link between them and Hansen. 6RP 491-92. Police seized graffiti-related materials from that residence, including piece books³ containing the tags GRAVE, HYMN, and SERIES. 6RP 494-98, 504-10.

Some of the evidence obtained from the Meighan and Morris residence led Almer to suspect Anthony Sanderson was associated with the HYMN tag, and he obtained a search warrant for Sanderson's Seattle residence. 6RP 536. Almer found examples of the HYMN tag in Sanderson's bedroom and in digital photos on Sanderson's computer. 6RP 546-47. According to Almer, when he confronted Sanderson with this

³ "Piece books" are sketch books in which taggers practice their tags. Similar to yearbooks, piece books are passed around for other taggers to sign. 6RP 453.

evidence, Sanderson admitted that he and Hansen were responsible for the Bellingham graffiti and that he uses the HYMN tag. 7RP 592-94.

Almer continued his investigation, searching for a suspect who might be associated with the SERIES tag. 7RP 597. Following a lead from someone caught tagging in a Seattle train yard, Almer called the Bay Area Rapid Transit Police Department to learn more about incidents of SERIES graffiti in the San Francisco area. As a result, Almer focused his investigation on Michael Foxhoven, and obtained a search warrant for Foxhoven's Seattle apartment. 7RP 597-99.

Unlike the other residences searched, Foxhoven's apartment was very neat and organized. 7RP 602; 8RP 780. At Amador's residence, for example, there was graffiti all over the walls, as if the room had been tagged. 5RP 310. By contrast, Foxhoven kept photographs of graffiti filed neatly in storage boxes and photo albums. 5RP 314.

In addition to the photographs, Almer located piece books containing SERIES, GRAVE, and HYMN tags and observed that SERIES was the predominant tag. 7RP 605-06, 612. He found videos and magazines about graffiti. 7RP 616. There was artwork hanging on the wall depicting the HYMN tag with the inscription "By Tony" and another canvas with SERIES 2002 written on the back. 7RP 619, 622. Among Foxhoven's photographs was a group of pictures of the SERIES tag on walls, dumpsters, trains, and a military helicopter. 7RP 633-40. There were also photographs showing

Foxhoven with the SERIES tag. 7RP 643-45. In addition, digital images and a movie depicting the SERIES tag were found on Foxhoven's computer. 7RP 646. Although Almer found spray paint and paint pens, no acid etching materials were found in Foxhoven's apartment. 5RP 311; 7RP 617, 621; 8RP 780.

Foxhoven called Almer following the search to discuss the investigation. When Almer said he suspected Foxhoven was involved in the Bellingham graffiti, Foxhoven denied the accusation. Foxhoven explained that although he used to do SERIES tagging and was arrested for it in California, he was no longer an active tagger. He had the materials in his apartment because he did graphic design and the graffiti style was very popular. 7RP 649. Foxhoven said he knew Hansen and Sanderson, but not necessarily as the taggers GRAVE and HYMN. 7RP 652-53.

Following Almer's investigation, the State charged Hansen, Sanderson, and Foxhoven with separate counts of malicious mischief for each of the Bellingham businesses damaged by graffiti. CP 91-95. Hansen pled guilty, and Foxhoven and Sanderson went to trial. 2RP 128.

Foxhoven's attorney moved in limine to preclude evidence of prior crimes, wrongs, or acts associated with Foxhoven. Specifically, counsel sought to suppress photographs of the SERIES tag seized from Foxhoven's apartment and testimony regarding Foxhoven's prior criminal conduct in California. CP 75; 4RP 160-65. The State argued evidence of Foxhoven's

use of the SERIES tag in the past was admissible to establish *modus operandi*, asserting these were "signature" crimes. 4RP 160. Foxhoven argued the State could not show his past use of the SERIES tag was unique enough to establish identity in the charged offenses and therefore the highly prejudicial prior crimes evidence should be excluded under ER 404(b). 4RP 164-65.

The court denied the defense motion, ruling the evidence was admissible because Foxhoven admitted using the SERIES tag in California. 4RP 165-66, 231. The court did not address any of the ER 404(b) issues raised by the defense when making its ruling. *Id.* At sentencing, the court signed an order stating the prior acts of graffiti were admitted to show a common scheme or plan or to establish *modus operandi*. The order also concludes the prejudicial effect of the evidence did not outweigh its probative value. CP 97-98.

Sanderson also moved to exclude evidence of his prior acts, arguing the evidence of past acts of graffiti did not rise to the level of *modus operandi* or identity evidence. 4RP 196. The court acknowledged the substantial burden the State must meet to establish identity through evidence of prior acts. The court noted, however, that if the tags done in the past appeared to be the same as the tags in the charged crimes, they would come in. 4RP 202. Evidence of Sanderson's prior acts of graffiti was admitted without further ruling by the court. *See* 4RP 259-66.

At Sanderson's request, the court gave the following instruction regarding the ER 404(b) evidence:

[E]vidence . . . is being introduced at this time on the subject of the defendants' association with persons accused of graffiti vandalism or prior acts of graffiti vandalism for which they're not charged here today. This is being offered by the prosecution for the limited purposes of either modus operandi or common scheme, plan, or design. You're not to consider the evidence for any other purpose.

6RP 452.

At trial, Almer admitted he had no facts connecting Foxhoven with the SERIES graffiti in Bellingham. In fact, in all the interviews he conducted during his investigation, no one had ever told him Foxhoven had participated in the Bellingham graffiti. 8RP 787-88. Instead, the State's case against Foxhoven rested on Foxhoven's use of the SERIES tag in the past. The jury was shown the photographs seized from Foxhoven's apartment to demonstrate his prior acts. 7RP 633-45.

In addition, Officer Henrick Bonafacio of the Bay Area Rapid Transit Police testified that in 1997 he investigated several instances of the graffiti tag "SERIES" on airplanes, trains, and other property in the San Francisco area. 3RP 15. Foxhoven was the suspect. In a search of Foxhoven's residence, police found piece books, stickers with the SERIES tag, and a video showing Foxhoven spray-painting the SERIES tag on airplanes and trains. 3RP 17-18. Bonafacio's partner took a written confession from Foxhoven. 3RP 20-21.

Relying on evidence of Foxhoven's 1997 graffiti, as well as testimony about the "graffiti culture," the State sought to establish SERIES was Foxhoven's tag and no one else would have used it. 6RP 402; 9RP 942, 1002.

Although the State's witnesses described a tag as a moniker used to identify a specific tagger, 6RP 409, Foxhoven established through cross examination that there are situations when taggers will write someone else's tag. Seattle Police Detective Rodney Hardin testified that sometimes a tagger will list a "roll call" of other members of his group. 5RP 286. He also explained that taggers will "hookup," which means writing someone else's tag, giving recognition to a tagger who is not present when the graffiti is done. 5RP 287, 306. On cross examination, Officer Almer identified specific examples of other taggers use of the SERIES tag in piece books. 8RP 781-784. He also identified a photograph that depicted the HYMN, GRAVE and SERIES tags, all written by Hansen, on a wall in Seattle. 8RP 784-85.

A jury found Foxhoven guilty on all counts. CP 23-27. On appeal, Foxhoven challenged the trial court's admission of his prior graffiti, arguing it constituted improper propensity evidence. Brief of Appellant at 10-20; Reply Brief of Appellant at 1-3. The Court of Appeals affirmed,

concluding the prior graffiti evidence was properly admitted under the *modus operandi* exception to ER 404(b). Slip Op.⁴

C. ARGUMENT

1. THE COURT OF APPEALS CONFUSED THE ANALYSIS FOR THE *MODUS OPERANDI* WITH THE ANALYSIS FOR THE COMMON SCHEME OR PLAN.

In State v. Dewey, Division Two of the Court of Appeals erroneously conducted the more stringent analysis for admissibility of evidence under the *modus operandi* exception to ER 404(b)⁵ to evidence sought to be admitted under the common scheme or plan exception. State v. DeVincentis, 150 Wn.2d 11, 18-19, 74 P.3d 119 (2003) (discussing State v. Dewey, 93 Wn. App. 50, 58, 966 P.2d 414 (1998), review denied, 137 Wn.2d 1024, 980 P.2d 1285 (1999), overruled in part by DeVincentis, 150 Wn.2d 11). Here, in affirming Foxhoven's convictions, Division One of the Court of Appeals made the opposite mistake by erroneously conducting the *less* stringent analysis for admissibility under the common scheme or

⁴ A copy of the Court of Appeals decision is attached as an appendix.

⁵ ER 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake.

plan exception, which does not apply here,⁶ to evidence properly analyzed under the more stringent analysis for admissibility under the *modus operandi* exception. When properly analyzed, it is apparent the trial court abused its discretion in admitting evidence of Foxhoven's 1997 acts of painted graffiti in California, to prove he was responsible for 2001 acts of acid etched graffiti in Bellingham.

The *modus operandi* exception to ER 404(b) applies when the issue is the identity of the crime's perpetrator. DeVincentis, 150 Wn.2d at 18. When evidence of prior bad acts is introduced as proof of identity by establishing a unique *modus operandi*, the evidence is relevant to the current charge "only if the method employed in the commission of both crimes is 'so unique' that proof that an accused committed one of the crimes creates a high probability that he also committed the other crimes with which he is charged." State v. Thang, 145 Wn.2d 630, 643, 41 P.3d 1159 (2002); State v. Bythrow, 114 Wn.2d 713, 720, 790 P.2d 154 (1990). The *method* used in committing the crimes must be so unusual and distinctive as to be like a signature. Thang, 145 Wn.2d at 643. "*Mere similarity* of crimes will not justify the introduction of other criminal acts under the rule. There must be something *distinctive or unusual* in the *means employed* in such

⁶ See argument in §C.2., infra.

crimes *and* the *crime charged*." State v. Smith, 106 Wn.2d 772, 777, 725 P.2d 951 (1986) (emphasis in original).

In comparison, the common scheme or plan exception applies when the issue is not the identity of the crime's perpetrator, but instead whether the charged crime occurred at all. DeVincentis, 150 Wn.2d at 18-19. When evidence of prior bad acts is introduced as proof that the charged crime occurred by establishing a common scheme or plan, the evidence is relevant if "the evidence of prior conduct . . . demonstrate[s] not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations." State v. Lough, 125 Wn.2d 847, 860, 889 P.2d 487 (1995).

As this Court recently summarized,

when identity is at issue, the degree of similarity must be at the *highest level* and the commonalities *must be unique* because the crimes must have been *committed* in a manner to serve as an identifiable signature. In contrast, the issue in the present case was not the identity of the perpetrator, but whether the crime occurred. Although a unique method of committing the bad acts is a potential factor in determining similarity, uniqueness is not required.

DeVincentis, 150 Wn.2d at 21.

Here, the Court of Appeals recited the rule for *modus operandi*, but then applied the less onerous test for admission under common scheme or

plan. Slip Op. at 5-7. This misapplication is apparent from the court's analysis of the issue, which in its entirety states:

Officer Almer testified about the use of tags as signatures among graffiti artists. The purpose behind using a tag within the graffiti culture is to identify the tagger to other graffiti artists. The manner in which the tags are applied and the surface they appear on are secondary to the tag itself. Whether the tags are applied using paint or acid-etching, upon helicopters, bridges, train cars, posters or windows, the signature quality of the tags remains the same. Both Foxhoven and Sanderson admitted to using these tags in other graffiti, and that graffiti varied significantly in style and location. The many photographs the police found of Foxhoven's and Sanderson's earlier acts of graffiti demonstrate that the "signature" comes not from the surface or medium but rather from the connection between the tag and the artist who draws it. That these were Foxhoven's and Sanderson's signatures is demonstrated by the photographs which included images of them posing with their signature tags. This evidence, coupled with Foxhoven and Sanderson's own admissions to using the tags, was both relevant and highly probative of the identity of the taggers.

While the tags in question do vary in their font, style, medium and the objects on which they were painted, these apparent differences go to the weight rather than the admissibility of this evidence. The defendants had every opportunity to argue, and did argue, that the tags were used by someone other than themselves. We hold the trial court did not abuse its discretion when it admitted Foxhoven's and Sanderson's prior acts of graffiti.

Slip Op. at 6-7.

The court's conclusion that "[t]he manner in which the tags are applied and the surface they appear on are secondary to the tag itself" with regard to whether a specific tag constitute a "signature" may be correct in the context of how others graffiti artists view a tag. In the context of

whether the *modus operandi* exception applies in a criminal trial, however, "the *method* employed in the commission of both crimes" is the critical to the determination. Thang, 145 Wn.2d at 643 (emphasis added). "*Mere similarity* of crimes will not justify the introduction of other criminal acts under the rule. There must be something *distinctive or unusual* in the *means employed* in such crimes *and the crime charged*." Smith, 106 Wn.2d at 777 (emphasis in original). Comparison of the "*method* employed" in each instance here leads to the inescapable conclusion that the California graffiti was improperly admitted.

Foxhoven's 1997 acts of painted graffiti in California are similar to the 2001 acts of acid etched graffiti on store window fronts in Bellingham because each depicted the same sequence of letters, S-E-R-I-E-S. But the similarities end there. In all other respects, including temporal and geographic proximity, method of application, "font, style, medium and the objects on which they were [applied]" all differ significantly.⁷ Slip Op. at 7. As a review of this Court's prior decisions show, these differences

⁷ For example, Exhibit 97 contains six photographs of the SERIES tag in various locations. One tag is done in simple capital letters, another is done in block letters with stars, a third has much larger block letters without stars, the fourth is slightly more stylized, and two more contain very elaborate block letters. Moreover, there was no evidence Foxhoven had ever previously vandalized store windows. Instead, the State's evidence showed graffiti on posters, walls, trains, and a helicopter. See Exhibits 95-109. Nor was there any evidence Foxhoven had ever done acid etching in the past. All the prior acts relied on by the State involved spray paint.

are significant in analyzing admissibility under the *modus operandi* exception.

In Thang, the defendant was accused and convicted of murdering an elderly woman in her home by kicking her to death. 145 Wn.2d at 634. On appeal, Thang argued the trial court erred in admitting evidence of his involvement in a robbery and burglary of another elderly woman a year and a half before. 145 Wn.2d 642. The similarities between the two incidents were that "(1) both cases involved theft of a purse and jewelry; (2) both victims were elderly; (3) in both cases, the perpetrator allegedly remarked that 'the bitch is dead' and (4) both victims were kicked[.]" 145 Wn.2d at 645. The dissimilarities included "(1) they occurred 18 months apart; (2) they took place in different parts of the state; (3) one victim was kicked three times and the other until she died; (4) [i]n one case, entry occurred through a door, and in the other, through a window; (5) in one case, the perpetrators fled in the victim's car, and in the other case, on foot." Id.

This Court agreed with the trial court's assessment that "'the two incidents do not reflect . . . an over-arching design or plan nor specifically a signature type crime.'" Id. (quoting the trial court). In light of this assessment, this Court concluded the trial court erred in admitting evidence of the earlier incident. Id.

In contrast to Thang, this Court found the *modus operandi* exception applicable in State v. Russell,⁸ State v. Brown,⁹ and State v. Laureano.¹⁰ In Russell, this Court held that evidence of separate murders was cross admissible to establish identity where each victim was killed by violent means, sexually assaulted, and then posed with props, and where the murders occurred within a few weeks of each other in a small geographic area. 125 Wn.2d at 68.

In Brown, this Court held that evidence of the defendant's prior thefts was admissible to establish his identity as the perpetrator of the charged thefts. There, in each of the defendant's prior crimes and the charged offenses, the thief approached the victim offering to sell salvaged televisions or video equipment, directed the victim to drive to a certain part of Seattle, took cash from the victim, left the victim waiting, did not return to the victim at that location, and contacted the victim a short time later. 113 Wn.2d at 527. This method of committing the crimes was so distinctive that proof that the defendant committed the prior crimes created a high probability that he committed the charged offenses. Id.

⁸ 125 Wn.2d 24, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995).

⁹ 113 Wn.2d 520, 782 P.2d 1013 (1989).

¹⁰ 101 Wn.2d 745, 682 P.2d 889 (1984), overruled on other grounds by State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988).

In Laureano, the court found a number of substantial similarities between a prior robbery and the charged offense, including temporal proximity, the manner of entry, the time of day, the number of perpetrators, and the use of a shotgun. 101 Wn.2d at 765. While recognizing reasonable minds could differ as to whether these similarities established a distinctive *modus operandi*, the Supreme Court concluded the trial court did not abuse its discretion in admitting the prior crime evidence. Id.

As in Thang, the dissimilarities between Foxhoven's application of the SERIES tag in California and someone's application of the SERIES tag in Bellingham outweigh the similarities. The only similarity is the use of the same sequence of letters. The dissimilarities include (1) they occurred 4 years apart; (2) they took place in different states; (3) "SERIES" was painted in California but acid-etched in Bellingham; (4) unlike any of the California graffiti, all of the Bellingham graffiti was on store-front windows; and (5) the fonts and styles differed from location to location. Unlike in Laureano, Brown and Russell, lacking here is a basis to conclude there is "something *distinctive or unusual* in the *means employed* in" the California graffiti and the Bellingham graffiti. Smith, 106 Wn.2d at 777 (emphasis in original).

In affirming the admission of the California graffiti, the Court of Appeals failed to recognize that the signature-like similarity required for admission under the *modus operandi* exception differs significantly from

what graffiti artists may consider to be the "signature" of a fellow tagger. Whereas the "SERIES" tag may have been appropriately recognized as Foxhoven's "signature" by the other graffiti artists,¹¹ and even painted or acid-etched in locations by others on his behalf, to meet the signature-like quality required for admission under the *modus operandi* exception, the two acts have to be sufficiently unique and distinctive so as to create a high probability Foxhoven committed both acts. That standard is not met here given the temporal, geographic, medium, font, style and method-of-application differences between the two sets of acts.

There was no legitimate basis to admit evidence of Foxhoven's prior misconduct involving graffiti. While the evidence certainly made it appear that Foxhoven had a propensity for unlawful graffiti using the SERIES tag, it did not satisfy the stringent standard necessary to establish his identity as the perpetrator of the charged offenses. The trial court failed to give thoughtful consideration to the relevant issues, and its admission of the prior crimes evidence was an abuse of discretion. The Court of Appeals decision affirming the trial court is similarly erroneous because it failed apply the correct analysis for admissibility under the *modus operandi* exception.

¹¹ The evidence shows that sometimes taggers will use someone else's tag. For example, to give recognition to a tagger who is not present at the time the graffiti was done. 5RP 286-87, 306. Moreover, there was evidence that Desmond Hansen, who admitted doing the Bellingham graffiti, had used the SERIES tag in the past. 8RP 784-85.

Not only was admission of evidence of the California graffiti improper, it was highly prejudicial. When the trial court erroneously admits propensity evidence, the question on appeal is whether there is a reasonable probability that the outcome of the trial would have been different but for the court's error. Smith, 106 Wn.2d at 780.

In Smith, the defendant was charged with three rapes, and the trial court improperly admitted evidence of three prior burglaries to establish his identity as the rapist. This Court held that admission of the prior crimes evidence was reversible error because no one could positively identify the rapist and testimony showed the rapes could have been committed by different people. Under the circumstances, the erroneously admitted evidence could have materially affected the outcome of the trial. "Where identity of the accused is such a crucial issue, evidence of other unrelated crimes generates a good deal more heat than light, and may well be the basis upon which the jury convicts the accused." Id.

Here, as in Smith, no one identified Foxhoven as the perpetrator of the charged offenses. None of the business owners saw the vandals. 5RP 319, 321, 358, 361, 364, 375. There was no physical evidence placing Foxhoven at the scene. 8RP 809. There was evidence Hansen had used the SERIES tag previously. 7RP 784-85. And while both Hansen and Sanderson admitted participating in the charged crimes, neither said that Foxhoven was present. 8RP 788. Moreover, Officer Almer admitted

on cross examination that he had uncovered no facts connecting Foxhoven to the Bellingham graffiti. 8RP 787-88. In fact, the State conceded that its entire case against Foxhoven rested on the prior crimes evidence. 4RP 199. Under the circumstances, there is no question that the outcome of the trial would have been different if the court had properly excluded the evidence of Foxhoven's prior graffiti. The trial court's improper admission of this highly prejudicial propensity evidence requires reversal.

2. BECAUSE THE EXISTENCE OF THE CRIME WAS NOT IN DISPUTE AND THE EVIDENCE WAS NOT OFFERED TO PROVE AN OVERARCHING CRIMINAL ENTERPRISE, THE COMMON SCHEME OR PLAN EXCEPTION DID NOT APPLY.¹²

This Court has identified two circumstances where the defendant's commission of crimes similar to the crime charged may be admissible under the "common scheme or plan" exception to ER 404(b). The first is where several crimes "constitute constituent parts of a plan in which each crime is but a piece of the larger plan." Lough, 125 Wn.2d at 855. Under this exception, the State must show the prior acts are causally related to the crime charged, as in an ongoing criminal enterprise. DeVincentis, 150 Wn.2d at 19 (citing Lough, 125 Wn.2d at 860). An example of this type

¹² Below, the State asserted admission of the evidence under the "common scheme or plan" exception was not an abuse of discretion but provided no authority for this contention. Brief of Respondent. at 19-20. The Court of Appeals did not address the "common scheme or plan" exception in its analysis of the ER 404(b) issue.

of common scheme or plan would be the theft of a tool or weapon used to commit a subsequent crime, such as a burglary. DeVincentis, 150 Wn.2d at 19. This type of common scheme or plan is plainly not at issue here, as there was no claim of an ongoing criminal enterprise of which the prior acts were a part, and no causal relationship was shown between the prior acts and the charged crime.

The second circumstance where evidence may be admitted to show a common plan arises only where the existence of the charged offense itself is in dispute. DeVincentis, 150 Wn.2d at 19-21, Lough, 125 Wn.2d at 853 (citing John H. Wigmore, Evidence § 304 at 249 (James H. Chadbourn rev. ed. 1979)). In this circumstance, the State may introduce evidence tending to show an individual has devised a plan and used it repeatedly to perpetrate separate but very similar crimes. DeVincentis, 150 Wn.2d at 21 ("the issue in the present case was not the identity of the perpetrator, but whether the crime occurred"); Lough, 125 Wn.2d at 855 (prior acts of drugging then raping victims admissible to prove the same plan was used in the present case and to rebut defendant's claim of consent); see also State v. Wermerskirchen, 497 N.W.2d 235, 240 (Minn. 1993) (other crimes admissible under common plan exception to prove *doing* of charged act). There was no contention that the prior acts were offered to prove the charged offense occurred, which was not in dispute; thus, this theory of

admissibility under the "common scheme of plan" exception does not apply either.

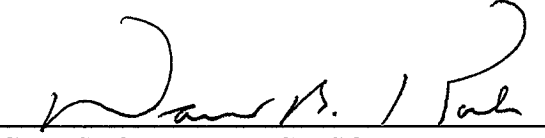
D. CONCLUSION

For the reasons argued in the petition for review and this brief, Foxhoven respectfully requests this Court to reverse the Court of Appeals decision, reverse his convictions, and remand for a new trial.

DATED this 11th of May, 2007.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 LAWRENCE MICHAEL FOXHOVEN,)
)
 Appellant.)
 _____)

No. 54793-3-I
(consolidated with 54857-3-I)

DIVISION ONE

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 ANTHONY ESPINOZA SANDERSON,)
)
 Appellant.)
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UNPUBLISHED OPINION

FILED: May 8, 2006

AGID, J. -- On October 26, 2004, someone vandalized the windows of several Bellingham businesses with acid-etched graffiti. The graffiti featured the words "GRAVE", "HYMN" and "SERIES." Michael Foxhoven (SERIES) and Anthony Sanderson (HYMN) were convicted of multiple counts of first and second degree malicious mischief and ordered to pay restitution. They appeal their convictions on the ground that evidence of prior bad acts was improperly admitted in violation of ER

404(b). In his pro se statement of additional grounds, Sanderson argues the trial court erred by admitting evidence illegally seized from his computer because police searched it without his consent and the warrant was insufficiently particular. Foxhoven argues in his pro se statement of additional grounds that his sentence was disproportionate to his co-defendant's and the court based his restitution order on untenable grounds.

The trial court did not err by admitting the evidence that Foxhoven and Sanderson engaged in prior acts of graffiti under the modus operandi exception to ER 404(b) because the tags were signature-like and both defendants admitted they had used the same tags before. The court properly admitted evidence from Sanderson's computer because the warrant authorized a search for digital images like those found on a computer. Finally, Foxhoven's sentence was not the same as the others involved in the crimes because his offender score was significantly higher than theirs, and the court correctly based its restitution order on the harm his acts caused. We affirm.

FACTS

When police investigated the October 26 graffiti vandalism, it led them to three suspects: Anthony Sanderson (HYMN), Michael Foxhoven (SERIES), and Desmond Gabriel Hansen (GRAVE). Officer Don Almer, the Bellingham Police Department's graffiti specialist, obtained a search warrant for Anthony Sanderson's home when he learned Sanderson was associated with the HYMN tag. The warrant authorized the search and seizure of

items recognized as graffiti and tagging paraphernalia . . . including but not limited to: . . . images of graffiti or graffiti-related malicious mischief in progress recorded in any form and/or on any medium, paperwork, or documents, or objects documenting graffiti tags and any evidence of Anthony E. Sanderson's criminal acts of malicious mischief.

At Sanderson's house, police found examples of the HYMN tag in his bedroom and on his computer. While searching his home, Officer Almer told him he was neither under arrest nor required to speak to police, but asked him questions concerning the October graffiti. During this conversation Sanderson admitted both that he and Hansen were responsible for the graffiti and he used the HYMN tag.

Officer Almer also received information from the Bay Area Rapid Transit Police Department (BART) about Foxhoven, who had moved from the San Francisco area to Bellingham. BART reported that Foxhoven was connected to graffiti incidents in the San Francisco area in which he used the tag SERIES. Based on this information, Officer Almer obtained a search warrant for Foxhoven's apartment. During the search, police found images of the HYMN and SERIES tags in photographs filed in storage boxes, albums, piece books, and on wall canvases. Some of the photographs showed Foxhoven posing next to the SERIES tag. Others were photographs of the SERIES tag on walls, dumpsters, trains, containers, and a military helicopter. Police also found digital images and a movie depicting the SERIES tag on Foxhoven's computer.

When Almer spoke to Foxhoven, he denied being involved in the Bellingham incidents but admitted to a prior California arrest for graffiti using the SERIES tag. Foxhoven said he was no longer an active tagger but used the photographs seized by police in his graphic design work because the style was popular. Foxhoven also said he knew Hansen and Sanderson but did not know them as the taggers GRAVE and HYMN.

The Whatcom County Prosecuting Attorney charged Hansen, Sanderson and Foxhoven with multiple counts of first degree and second degree malicious mischief.

Hansen pled guilty to several counts, but Sanderson and Foxhoven went to trial as co-defendants. Sanderson moved to suppress his statements to Officer Almer because he did not get his Miranda warnings.¹ He also moved to suppress evidence from the search of his computer, arguing the search warrant did not authorize the search. The court denied both motions. It ruled Sanderson's statements to Officer Almer were admissible because they were noncustodial. It also found the warrant was broad enough to authorize the search of the computer, and Sanderson had consented to the search. Sanderson and Foxhoven also moved to suppress photographic and other evidence of their earlier graffiti-related activities.² The court admitted the evidence under the modus operandi and common scheme or plan exceptions to ER 404(b).

Sanderson was convicted of one count of first degree and six counts of second degree malicious mischief. He was sentenced to 18 months and ordered to pay \$6,670.07 in restitution. Foxhoven was convicted of three counts of first degree malicious mischief, nine counts of second degree malicious mischief, and two counts of third degree malicious mischief. He was sentenced to 50 months and ordered to pay \$8,009.66 in restitution.

¹ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

² The admitted evidence included: (1) an investigation of Sanderson for train yard vandalism on June 17, 2002, based on incidents also involving Desmond Hansen; (2) numerous HYMN tags found in Hansen's bedroom as well as piece books and roll calls associating SERIES, HYMN and GRAVE; (3) photographs of Sanderson and Hansen on a graffiti website; (4) photographs of a HYMN tag on a train and of Sanderson painting HYMN on a train; (5) numerous loose-leaf sheets of paper with HYMN TWO and TONY written on them found in Sanderson's room; (6) 50-60 images of HYMN graffiti found on Sanderson's computer; and (7) piece books with the tags SERIES and HYMN found in Foxhoven's residence.

DISCUSSION

I. Evidence Rule 404(b)

ER 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

The State offered and the court admitted evidence of Sanderson's and Foxhoven's prior acts of graffiti to prove their identities as HYMN and SERIES. Foxhoven and Sanderson argue the trial court incorrectly analyzed the evidence under the test set forth in State v. Thang³ and should not have relied on their admissions that they had used the HYMN and SERIES tags before.

Evidence that would otherwise be inadmissible may be admitted to show the modus operandi of the crime. That exception applies only if the method used in the earlier crimes is "so unique" that it creates a high probability the defendant committed the crimes charged. The method should be unique and distinctive enough to be like a signature.⁴ Foxhoven and Sanderson argue that there was no signature-like similarity between the tags featured in the photographs seized in their homes and the Bellingham graffiti because the method, style, and location of the tags were different. Foxhoven also argues that his California acts were so long before the Bellingham graffiti that they were no longer probative. The State contends it presented sufficient evidence to show the defendants' consistent use of the SERIES and HYMN tags literally made the tags

³ 145 Wn.2d 630, 642; 41 P.3d 1159 (2002); see also State v. Trickler, 106 Wn. App. 727, 732, 25 P.3d 445 (2001); ER 403.

⁴ Thang, 145 Wn.2d at 643 (quoting State v. Russell, 125 Wn.2d 24, 66-67, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995)).

their unique signatures.⁵ It asserts that graffiti artists like Sanderson and Foxhoven use their tags to communicate their identity to other members of their graffiti subculture.

Trial courts have broad discretion in ruling on evidentiary matters, and their rulings will not be overturned on appeal absent a manifest abuse of discretion.⁶ A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds.⁷

Before a court may admit ER 404(b) evidence it must: (1) find by a preponderance of the evidence the misconduct occurred; (2) determine whether the evidence is relevant to a material issue; (3) state on the record the purpose for which the evidence is being introduced; and (4) balance the probative value of the evidence against the danger of unfair prejudice.⁸ Evidence is relevant if it tends to make the existence of any significant fact more or less probable than it would be without the evidence.⁹

Officer Almer testified about the use of tags as signatures among graffiti artists. The purpose behind using a tag within the graffiti culture is to identify the tagger to other graffiti artists. The manner in which the tags are applied and the surface they appear on are secondary to the tag itself. Whether the tags are applied using paint or acid-etching, upon helicopters, bridges, train cars, posters or windows, the signature quality of the tags remains the same. Both Foxhoven and Sanderson admitted to using these tags in other graffiti, and that graffiti varied significantly in style and location. The many

⁵ Thang, 145 Wn.2d at 642.

⁶ State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001) (citing State v. Bourgeois, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997)).

⁷ In re Parentage of J.H., 112 Wn. App. 486, 495, 49 P.3d 154 (2002), review denied, 148 Wn.2d 1024 (2003).

⁸ Thang, 145 Wn.2d at 642; see also Trickler, 106 Wn. App at 732.

⁹ ER 401.

photographs the police found of Foxhoven's and Sanderson's earlier acts of graffiti demonstrate that the "signature" comes not from the surface or medium but rather from the connection between the tag and the artist who draws it. That these were Foxhoven's and Sanderson's signatures is demonstrated by the photographs which included images of them posing with their signature tags. This evidence, coupled with Foxhoven and Sanderson's own admissions to using the tags, was both relevant and highly probative of the identity of the taggers.¹⁰

While the tags in question do vary in their font, style, medium and the objects on which they were painted, these apparent differences go to the weight rather than the admissibility of this evidence. The defendants had every opportunity to argue, and did argue, that the tags were used by someone other than themselves. We hold the trial court did not abuse its discretion when it admitted Foxhoven's and Sanderson's prior acts of graffiti.

II. Search and Seizure

In his pro se brief, Sanderson argues the court should have suppressed all evidence seized on his computer because the warrant did not permit police to search it and he did not give valid consent to the search. He contends the court should have analyzed the warrant with "most scrupulous exactitude" because graffiti is protected

¹⁰ Both Sanderson and Foxhoven's statements to Officer Almer were admissible because they were non-custodial and voluntarily made. Before Sanderson told Officer Almer he was identified with the HYMN tag and had committed the crimes in Bellingham, he was told he was neither arrested nor required to speak to police. After the search of his apartment, Foxhoven called Officer Almer on the telephone and admitted he had previously used the SERIES tag in the San Francisco Bay area.

speech under the First Amendment.¹¹ He also asserts his consent was invalid because the police did not tell him he could refuse or revoke consent, and they failed to limit the scope of the search of his computer as required in State v. Ferrier.¹² Alternatively, he argues he revoked his consent when he refused to give Officer Almer permission to search his C-Drive.

The State contends the warrant authorized police to search for "images of graffiti or graffiti-related malicious mischief," including the digital images found on Sanderson's computer. It asserts the warrant need not be reviewed under the "scrupulous exactitude" standard of State v. Perrone¹³ because the First Amendment does not protect acts of vandalism or photographs of criminal activities. Finally, it argues Sanderson consented to the search when he helped Officer Almer search his computer.

Under the Fourth Amendment, "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."¹⁴ Warrants are tested and interpreted in a common sense, practical manner rather than in a hypertechnical sense.¹⁵ But search warrants must be sufficiently definite to describe the property to be sought with reasonable certainty.¹⁶ This particularity requirement prevents the issuance of "[g]eneral warrants" authorizing unlimited searches and seizures by requiring a

¹¹ Stanford v. Texas, 379 U.S. 476, 485, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965).

¹² 136 Wn.2d 103, 114, 960 P.2d 927 (1998).

¹³ 119 Wn.2d 538, 548, 834 P.2d 611 (1992) ("[W]here items [are] without First Amendment protection, there need not be an extremely stringent test of specificity.").

¹⁴ U.S. CONST. amend. IV.

¹⁵ Perrone, 119 Wn.2d at 549.

¹⁶ State v. Muldowney, 60 N.J. 594, 292 A.2d 26 (1972); 2 Wayne R. LaFave, Search and Seizure § 4.6(a), at 551 (3d ed. 1996).

“particular description” of the things to be seized.¹⁷ We review de novo allegations that a search warrant does not satisfy the particularity requirement.¹⁸

Generally, the degree of specificity required varies according to the circumstances and the kind of items involved.¹⁹ A warrant’s description is valid if it is as specific as the circumstances of the crime under investigation permit.²⁰ Generic classifications are not necessarily impermissibly broad so long as there is probable cause and the precise identity of items sought can be determined when the warrant was issued.²¹ For example, in State v. Stenson the Washington Supreme Court held the general description of business records and documents in a warrant was not impermissibly broad because it limited the search to items indicating a relationship between the defendant and murder victim he was accused of killing.²²

Here, the warrant for Sanderson’s home limited the scope of the search to evidence of crimes Sanderson was suspected of committing by specifying “items . . . including but not limited to: . . . images of graffiti or graffiti-related malicious mischief in progress recorded in any form and/or on any medium . . . documenting graffiti tags and any evidence of Anthony E. Sanderson’s criminal acts of malicious mischief.” A commonsense reading of this language clearly permitted a search for images recorded

¹⁷ Andresen v. Maryland, 427 U.S. 463, 480, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976) (quoting Coolidge v. New Hampshire, 403 U.S. 443, 467, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971)).

¹⁸ State v. Nordlund, 113 Wn. App. 171, 180, 53 P.3d 520 (2002), review denied, 149 Wn.2d 1005 (2003); State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998).

¹⁹ Perrone, 119 Wn.2d at 546.

²⁰ Id. at 547.

²¹ Id.

²² 132 Wn.2d at 694.

in a digital format, including images found on a computer. The trial court correctly admitted the evidence found on Sanderson's computer.²³

III. Sentencing

Foxhoven argues his sentence was excessive because it is far longer than his co-defendants' sentences. He contends his 50-month sentence was unjust and disproportionate to Desmond Hansen's one-year sentence and Anthony Sanderson's 18-month sentence. But Foxhoven's sentence cannot be compared to either Hansen's or Sanderson's. Hansen entered into a plea agreement in exchange for his sentence. Sanderson and Foxhoven were convicted of a different number of counts, and Foxhoven had a higher offender score.²⁴ Foxhoven does not challenge the accuracy of his offender score, and his sentence was correctly computed.

IV. Restitution Order

The court ordered Foxhoven to pay \$8,009.66 in restitution for damage caused by the defendants' graffiti. Foxhoven challenges the restitution order on the ground the State failed to prove with certainty the amount of damages. The State did not respond to Foxhoven's Statement of Additional Grounds.

²³ Because we resolve this issue based on the warrant, we need not determine whether the consent was valid and/or revoked.

²⁴ Foxhoven was convicted of three counts of first degree malicious mischief, nine counts of second degree malicious mischief, and two counts of third degree malicious mischief. He had an offender score of 12 based on a prior class B felony conviction for theft. On the other hand, Sanderson was found guilty of only one count of first degree malicious mischief and six counts of second degree malicious mischief. His offender score was only five, and he did not have a prior criminal history.

We reject Foxhoven's argument. The trial court has great discretion when imposing restitution, and we will only reverse a restitution order for an abuse of discretion.²⁵ RCW 9.94A.753(3) directs trial courts to impose restitution based on "easily ascertainable damages." Evidence supporting restitution is sufficient if it provides a reasonable basis for estimating loss and is not based on mere speculation or conjecture.²⁶ The amount of harm or loss "need not be established with specific accuracy."²⁷ The trial court may rely on a defendant's acknowledgment to determine the amount of restitution.²⁸ Where a defendant disputes the facts, the State must prove the amount of restitution by a preponderance of the evidence.²⁹ Former RCW 9.94A.030(34) defines restitution as "a specific sum of money ordered by the sentencing court to be paid by the offender to the court over a specified period of time as payment of damages. The sum may include both public and private costs."³⁰ Here, the evidence presented at the restitution hearing was sufficient to establish the damage the graffiti caused. The trial court's restitution order was based on this evidence and was therefore

²⁵ State v. Hughes, 154 Wn.2d 118, 154, 110 P.3d 192 (2005) (citing State v. Enstone, 137 Wn.2d 675, 679, 974 P.2d 828 (1999)).

²⁶ State v. Fleming, 75 Wn. App. 270, 274-275, 877 P.3d 243 (1994) (quoting State v. Pollard, 66 Wn. App. 779, 785, 834 P.2d 51, review denied, 120 Wn.2d 1015 (1992)), petition dismissed, 129 Wn.2d 529, 919 P.2d 66 (1996).

²⁷ Hughes, 154 Wn.2d at 154 (quoting Fleming, 75 Wn. App. at 274).

²⁸ State v. Hunsicker, 129 Wn.2d 554, 558-59, 919 P.2d 79 (1996); State v. Ryan, 78 Wn. App. 758, 761, 899 P.2d 825, review denied, 128 Wn.2d 1006 (1995).

²⁹ State v. Dedonado, 99 Wn. App. 251, 256, 991 P.2d 1216 (2000).

³⁰ Former RCW 9.94A.030(34) (2002), *recodified as* RCW 9.94A.030(37) (Laws of 2005, ch. 436 § 1).

not manifestly unreasonable or based on untenable grounds.

We affirm.

Ajid, J.

WE CONCUR:

Appelwick, Cj

Gox, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 78888-0
vs.)	
)	
MICHAEL FOXHOVEN,)	
)	
Petitioner.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 11th DAY OF MAY 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF PETITIONER MICHAEL FOXHOVEN** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- ☒ WHATCOM COUNTY PROSECUTOR'S OFFICE
WHATCOM COUNTY COURT HOUSE
311 GRAND AVENUE
BELLINGHAM, WA 98227
- ☒ WASHINGTON APPELLATE PROJECT
1511 3RD AVENUE, SUITE 701
SEATTLE, WA 98101
- ☒ MICHAEL FOXHOVEN
2801 14TH AVENUE W
APT. NO. 7
SEATTLE, WA 98119

SIGNED IN SEATTLE WASHINGTON, THIS 11th DAY OF MAY, 2007.

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